Superintendent of Lands and Surveys Department Bintulu Division & Anor v Agi ak Bungkong & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–104 OF 2010 AND Q-02–394 OF 2010
ABU SAMAH, MOHD HISHAMUDIN AND AZHAR MA'AH JJCA
21 OCTOBER 2011

Civil Procedure — Appeal — Interference by appellate court — Findings of facts and declarations by High Court erroneous and unsupported by evidence — Declarations based on and referred to map not tendered in evidence — Judgment turned on evidence of facts not pleaded — Whether mistrial or miscarriage of justice occurred — Whether retrial warranted

The respondents in both the above appeals were Ibans and residents of longhouses in Selezu, Setulai and Sepandok, all in the district of Sebauh, Bintulu, Sarawak. They claimed they had native customary rights ('NCR') and/or title and/or usufructuary rights over the lands at/or around the said longhouses. They were aggrieved that the State Government of Sarawak, through the Superintendent of Lands and Surveys Department, Bintulu Division (the first and second appellants in Civil Appeal No Q-01–104 of 2010) had issued two provisional land leases ('the leases') to Lembaga Tabung Haji and Semai Mekar Sdn Bhd (the second and third appellants in Civil Appeal No Q-02–394 of 2010). The respondents claimed the areas covered by the leases encroached into lands over which they had NCR. They sued the appellants in the High Court praying, inter alia, for the leases, in so far as they impaired their NCR, to be declared void. The High Court found in favour of the respondents declaring they had native titles and/or NCR and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim and that the leases were subject to those rights and/or title. The court ordered the leases to be rectified to exclude the respondents' native customary lands and that the respondents be given vacant possession of those lands forthwith. The trial judge's decision, however, was not at all based on map 'M' ('the first map') but on four other different maps ('the four maps') which were tendered in evidence by one of the respondents' witnesses ('PW5') who had prepared them. In their appeal against the verdict to the Court of Appeal, the appellants said the leases did not include the respondents' native customary lands and that they had not committed trespass. They also said the High Court's verdict was bad as: (i) no evidence concerning the first map was produced at the trial to establish which area of the leases were the respondents' native customary lands; neither did PW5 say the four maps were similar to the first map or that the four maps covered or included a substantial part of the leases and that (ii) the respondents were

bound by their pleadings which made no reference to the four maps but only to the first map. In the dissenting judgment, the appeal court pointed out several perplexing and unanswered questions concerning the first map which had 'cast a cloud over the propriety and legality of the entire proceedings before the High Court'. These were: (i) why was the first map not, as legally required, attached to the High Court order as an appendix although the order referred to it; (ii) why was the first map missing from the appeal records if the statement of claim said the first map was annexed to it; and why was the respondents' counsel unable to produce a copy of the map when requested to do so by the court; (iii) why, if the appellants maintained the first map was not attached to the statement of claim served on them, did they not point out that defect but instead drafted their statements of defence as if they were served with the map and knew what it contained; (iv) why was the issue of the absent first map not raised at the case management stage instead of the parties framing the issue to be tried with reference to the first map; (v) why did the judge in conduct of the case management not query the issue of the absent first map instead of ordering the matter to proceed to trial despite the pleading being defective and meaningless; (vi) why, if the court's order at the end of the trial wrongly referred to the first map, did the appellants' solicitors approve the draft order without reservation or question; (vii) why, if the respondents had abandoned reliance on the first map during the trial in favour of the four maps, did the verdict of the court refer to the first map; (viii) why, if the first map was not included in the appeal records prepared by the appellants' solicitors, did the respondents' solicitors not raise any issue about it; (ix) why, despite the appeal court asking the trial judge to clarify whether the first map was attached to the statement of claim, did his supplementary grounds of judgment never answer that query nor explain why he referred to the first map twice in his judgment even though it was never part of the evidence.

Held, allowing the appeals with costs here and below:

(1) (per **Abdul Samah JCA**) The findings of facts and the declarations granted by the trial judge on the basis of map 'M' were erroneous and unsupported by evidence (see para 25).

(2) (per **Abdul Samah JCA**) Map 'M' was never tendered as evidence to support the respondents' claim, although that was their pleaded case. None of the respondents' witnesses made any reference to map 'M' and no attempt was made to establish its existence (see para 22).

(3) (per **Abdul Samah JCA**) There was no documentary or oral evidence that the disputed land in the leases was in fact the respondents' native customary land as set out in map 'M' or that the land in the four maps was the same land as set out in map 'M'. It was impossible to make a finding of fact that the land in the four maps was the same land as in map 'M' as the latter was never tendered in evidence (see para 23).

(4) (per **Abdul Samah JCA**) If the respondents intended to rely on the four maps to prove their case, those facts must have been stated in their pleading, otherwise they were not entitled to give evidence of them at the trial. The declarations were granted based on the evidence of PW5 and the four maps which were never pleaded in the statement of claim (see paras 32 & 35).

(5) (per **Abdul Samah JCA**) There was no basis for a retrial as the conditions in s 71 read with s 72 of the Courts of Judicature Act 1964 were not present. There was no suggestion the trial was a nullity, that there had been a miscarriage of justice, that the rules of natural justice had been breached or that the trial court had no jurisdiction. The respondents did not see it fit to amend their pleading to substitute map 'M' with the four maps so as to suit the evidence adduced. The case had been decided on its merits after hearing witnesses from both sides (see paras 37 & 39).

(6) (per **Mohd Hishamudin JCA, dissenting**) It appeared that the entire proceedings before the High Court was a messy affair, if not weird. There could possibly have been a mistrial and a miscarriage of justice contributed by all parties to the proceedings, including the trial judge (see para 48).

(7) (per **Mohd Hishamudin JCA, dissenting**) The whole scenario in its totality was a highly unsatisfactory state of affairs. The issue about the existence of map 'M' should not be allowed to linger. In all probability there had been a mistrial and the appropriate course was to order a retrial before another judge and that there should be no order as to costs (see para 67).

[Bahasa Malaysia summary

Responden-responden dalam kedua-dua rayuan merupakan kaum Iban dan penduduk rumah panjang di Selezu, Setulai dan Sepandok, semua dalam daerah Sebauh, Bintulu, Sarawak. Mereka mendakwa mempunyai hak-hak adat anak watan ('HHAAW') dan/atau hak milik dan atau hak-hak *usufruk* ke atas tanah-tanah di/atau sekitar rumah panjang tersebut. Mereka terkilan kerana Kerajaan Negeri Sarawak, melalui Penguasa Tanah dan Jabatan Kaji Selidik, Bahagian Bintulu (perayu-perayu pertama dan kedua dalam Rayuan Sivil No Q-01–104 tahun 2010) telah mengeluarkan dua pajakan tanah sementara ('pajakan tersebut') kepada Lembaga Tabung Haji dan Semai Mekar Sdn Bhd (perayu-perayu kedua dan ketiga dalam Rayuan Sivil No Q-02–394 tahun 2010). Responden-responden mendakwa kawasan-kawasan yang merangkumi pajakan tersebut telah menceroboh ke atas tanah-tanah yang mana mereka mempunyai HHAAW. Mereka telah menyaman perayu-perayu di Mahkamah Tinggi memohon, antara lain, agar pajakan tersebut, setakat mana ia menjejaskan HHAAW mereka, diisytiharkan tidak sah. Mahkamah Tinggi didapati menyebelahi responden-responden dengan mengisytiharkan

mereka mempunyai hak milik anak watan da/atau HHAAW dan/atau hak-hak *usufruk* ke atas tanah sepertimana ditandakan dalam kawasan yang ditanda kuning dalam peta yang ditanda 'M' yang dilampirkan kepada penyataan tuntutan dan bahawa pajakan tersebut tertakluk kepada hak-hak dan/atau hak milik tersebut. Mahkamah memerintahkan pajakan tersebut diperbetulkan bagi mengecualikan tanah-tanah adat anak watan responden-responden dan agar responden-responden diberikan milikan kosong ke atas tanah-tanah tersebut. Keputusan hakim perbicaraan, bagaimanapun, tidak langsung berdasarkan peta bertanda 'M' ('peta pertama') tetapi pada empat peta lain yang berbeza ('empat peta tersebut') yang telah dikemukakan dalam keterangan oleh salah seorang daripada saksi responden-responden ('PW5') yang telah menyediakannya. Dalam rayuan mereka terhadap keputusan Mahkamah Rayuan, perayu-perayu menyatakan pajakan tersebut tidak termasuk tanah-tanah adat anak watan responden-responden dan bahawa mereka tidak melakukan pencerobohan. Mereka juga menyatakan bahawa keputusan Mahkamah Tinggi salah dari segi undang-undang kerana: (i) tiada keterangan berkaitan peta pertama dikemukakan semasa perbicaraan untuk membuktikan mana kawasan pajakan tersebut merupakan tanah-tanah adat anak watan responden-responden; PW5 juga tidak menyatakan empat peta tersebut adalah sama dengan peta pertama atau bahawa empat peta tersebut merangkumi atau termasuklah sebahagian besar pajakan tersebut dan bahawa (ii) responden-responden terikat dengan rayuan-rayuan mereka yang tidak merujuk kepada empat peta tersebut tetapi hanya kepada peta pertama. Dalam penghakiman menentang, mahkamah rayuan mengutarakan beberapa persoalan membingungkan dan tiada jawapan berkaitan peta pertama yang telah 'cast a cloud over the propriety and legality of the entire proceedings before the High Court'. Antaranya adalah: (i) kenapa peta pertama tidak, sepertimana diperlukan di sisi undang-undang, dilampirkan kepada perintah Mahkamah Tinggi sebagai lampiran meskipun perintah itu merujuk kepadanya: (ii) kenapa peta pertama hilang dari rekod rayuan jika penyataan tuntutan menyatakan peta pertama dilampirkan kepadanya; dan kenapa peguam responden-responden tidak dapat mengemukakan salinan peta itu apabila diminta berbuat demikian oleh mahkamah; (iii) kenapa, jika perayu-perayu menegaskan peta pertama tidak dilampirkan pada penyataan tuntutan yang disampaikan ke atas mereka, tidak dibangkitkan oleh mereka tentang kecacatan itu tetapi sebaliknya membuat draf penyataan pembelaan mereka seolah-olah mereka telah diserahkan dengan peta itu dan mengetahui tentang kandungannya; (iv) kenapa isu ketiadaan peta pertama tidak ditimbulkan di peringkat pengurusan kes tetapi sebaliknya pihak-pihak menimbulkan isu yang perlu dibicarakan dengan merujuk kepada peta pertama; (v) kenapa hakim yang mengendalikan pengurusan kes tidak menyoalkan isu ketiadaan peta pertama itu tetapi sebaliknya memerintahkan perkara itu dibicarakan meskipun pliding cacat dan tiada makna; (vi) kenapa, jika perintah mahkamah di akhir perbicaraan telah salah merujuk kepada peta pertama, peguam perayu-perayu meluluskan draf perintah tanpa sebarang

persoalan; (vii) kenapa, jika responden-responden tidak bergantung kepada peta pertama semasa perbicaraan dan menyebelahi empat peta tersebut, keputusan mahkamah merujuk kepada peta pertama; (viii) kenapa, jika peta pertama tidak termasuk dalam rekod rayuan yang disediakan oleh peguam perayu-perayu, peguam responden-responden tidak menimbulkan apa-apa isu berhubungnya; (ix) kenapa, walaupun mahkamah rayuan bertanyakan hakim perbicaraan untuk menjelaskan sama ada peta pertama telah dilampirkan pada penyataan tuntutan, alasan-alasan tambahan penghakiman beliau tidak menjawab persoalan tersebut mahupun menjelaskan kenapa beliau telah merujuk kepada peta pertama sebanyak dua kali dalam penghakiman beliau meskipun ia bukan sebahagian daripada keterangan.

Diputuskan, membenarkan rayuan-rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) (oleh **Abu Samah HMR**) Penemuan fakta dan deklarasi yang diberikan oleh hakim perbicaraan berasaskan peta 'M' adalah salah dan tidak disokong oleh keterangan (lihat perenggan 25).

(2) (oleh **Abu Samah HMR**) Peta 'M' tidak pernah dikemukakan sebagai keterangan bagi menyokong tuntutan responden-responden, meskipun itulah kes yang diplidkan mereka. Tiada daripada saksi responden-responden membuat apa-apa rujukan kepada peta 'M' dan tiada percubaan dibuat untuk membuktikan kewujudannya (lihat perenggan 22).

(3) (oleh **Abu Samah HMR**) Tiada keterangan dokumentar atau lisan bahawa tanah yang dipertikaikan dalam pajakan tersebut pada hakikatnya tanah adat anak watan responden-responden sepertimana dinyatakan dalam peta 'M' atau bahawa tanah dalam empat peta tersebut adalah tanah yang sama sepertimana dinyatakan dalam peta 'M'. Adalah mustahil untuk membuat penemuan fakta bahawa tanah dalam empat peta tersebut adalah tanah yang sama sepertimana dalam peta 'M' kerana tidak dikemukakan dalam keterangan (lihat perenggan 23).

(4) (oleh **Abu Samah HMR**) Jika responden-responden berniat untuk bergantung kepada empat peta tersebut untuk membuktikan kes mereka, fakta-fakta tersebut telah pun dinyatakan dalam pliding mereka, jika tidak mereka tidak berhak memberikan keterangan mereka semasa perbicaraan. Deklarasi-deklarasi yang diberikan berdasarkan keterangan PW5 dan empat peta tersebut yang tidak pernah diplid dalam penyataan tuntutan (lihat perenggan 32 & 35).

(5) (oleh **Abu Samah HMR**) Tiada asas untuk perbicaraan semula kerana syarat-syarat dalam s 71 dibaca dengan s 72 Akta Mahkamah Kehakiman 1964 tiada. Tiada cadangan bahawa perbicaraan terbatal, bahawa keadilan tidak dilaksanakan, bahawa rukun keadilan telah dilanggar atau

bahawa mahkamah perbicaraan tiada bidang kuasa. Responden-responden melihat ia tidak sesuai untuk meminda pliding mereka untuk menggantikan peta 'M' dengan empat peta tersebut untuk menyesuaikan dengan keterangan yang dikemukakan. Kes tersebut telah diputuskan atas meritnya selepas mendengar saksi-saksi dari kedua-dua pihak (lihat perenggan 37 & 39).

(6) (oleh **Mohd Hishamudin HMR, menentang**) Adalah dilihat bahawa keseluruhan prosiding di hadapan Mahkamah Tinggi suatu yang berkecamuk, jika tidak pelik. Mungkin telah berlaku perbicaraan secara salah dan keadilan tidak dilaksanakan yang telah disumbangkan oleh semua pihak dalam prosiding, termasuklah hakim perbicaraan (lihat perenggan 48).

(7) (oleh **Mohd Hishamudin HMR, menentang**) Keseluruhan senario merupakan urusan yang tidak memuaskan. Isu tentang kewujudan peta 'M' tidak patut dibenarkan berpanjangan. Dalam segala kebarangkalian terdapat perbicaraan yang salah dan jalan yang sesuai adalah dengan perbicaraan semula di hadapan hakim lain dan bahawa tidak patut ada perintah untuk kos (lihat perenggan 67).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1158–1182.

Cases referred to

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 227, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Dowman's case (1586) 9 Co Rep 7b, Moo KB 191 (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

John G Stein & Co Ltd v O'Hanlon [1965] 1 All ER 547, HL (refd)

Kanagasabai Satkuru v United Malayan Banking Corporation Bhd [1981] 2 MLJ 23, FC (refd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416; [1989] 1 CLJ Rep 116, SC (refd)

North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1913] 3 KB 422, CA (refd)

Pawding v London Brick Co (1971) 4 KIR 207 (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Waghorn v George Wimpey & Co Ltd [1969] 1 WLR 1764 (refd)

West Rand Central Gold Mining Co v R [1905] 2 KB 391 (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 71, 72
Federal Constitution arts 5, 8, 13
Laws of Sarawak Land Code 1958 s 2(a)
Rules of the High Court 1980 O 18 r 7

Appeal from: Suit No 22–93 of 2001–111–1 (High Court, Kuching)

JC Fong, Senior State Legal Counsel (Dewi Rahmaz bt Majid, State Legal Counsel with him) (Office of the State Attorney-General, Sarawak) in Civil Appeal No Q-01–104 of 2010 for the appellants.
Sim Hui Chuang (Lim Lip Sze and Fatmawaty Morshidi with him) (Hamzah & Ong) in Civil Appeal No Q-02–394 of 2010 for the appellants.
Baru Bian (See Chee How and Desmond Khoo with him) (Baru Bian) in Civil Appeal Nos Q-01–104 of 2010 and Q-02–394 of 2010 for the respondents.

Abu Samah JCA:

[1] There are two appeals before us, namely Civil Appeal No Q-01–104 of 2010 ('the first appeal') and Civil Appeal No Q-02–394 of 2010 ('the second appeal'). These appeals are against the decision of the High Court at Kuching, Sarawak in respect of two suits which had been consolidated and heard together by the same judge. We heard both appeals together.

[2] The first and second appellants in the *first appeal* are the Superintendent of Lands and Surveys Department of Bintulu Division ('SLS') and the State Government of Sarawak ('SGS') respectively. The latter is the employer of the former.

[3] The first, second and third appellants in the *second appeal* are Ladang Sawit Bintulu Sdn Bhd ('LSB'), Lembaga is Tabung Haji ('LTH') and Semai Mekar Sdn Bhd ('SMSB') respectively. The first appellant is a joint venture company set up by the second and third appellants.

[4] The respondents in both appeals are Iban by race and natives of Sarawak. They bring these actions against the appellants on their own behalf as well as on behalf of the residents of the longhouse communities of Selezu, Setulai and Sepandok of Sebauh District, Bintulu, Sarawak.

[5] The subject matter of these appeals concerns a large parcel of land of about 6,692 hectares ('the disputed land') described as Lot 2 Block 4 Selezu Land District in the Bintulu Division of Sarawak which was issued to LTH and SMSB by the SLS on 2 December 1996 under a provisional lease of state land pursuant to the Sarawak Land Code (Cap 81). It is not disputed that LTH and SMSB are the joint registered holders of the disputed land.

[6] For convenience and to avoid any confusion, I refer to the parties in these appeals by their own names.

THE CLAIMS

[7] The respondents aver that at all material times they have acquired native customary rights ('NCR') and/or title and/or usufructuary rights over the lands at and/or around the longhouse communities of Selezu, Setulai and Sepandok of Sebauh District, Bintulu, Sarawak. The boundary or extend of their lands are set out in a map annexed to the statement of claim and marked 'M' and edged in yellow. They claim that the disputed land which was issued by the SLS to LTH and SMSB 'cover and include a substantial part of their native customary lands'. What this means is that the respondents are not claiming the whole of the disputed land which was issued to LTH and SMSB but only a substantial part of the said land. I mention this at the outset because the issues between the parties at the trial include, among others:

(a) the exact location of the native customary lands within the disputed land;

(b) whether the respondents have acquired native customary rights and/or native title and/or usufructuary rights over the land issued to LTH and SMSB; and

(c) whether the issue of the provisional lease to LTH and SMSB was bad in law, void and unconstitutional. As between the respondents and LSB, LTH and SMSB, the principal issue is whether LSB, LTH and SMSB or any one of them had trespassed on the respondents' native customary lands as set out in the map marked 'M' and edged in yellow.

[8] The respondents claim that the disputed land issued to LTH and SMSB is their native customary lands which had been acquired prior to 1 January 1958 and recognised by the Sarawak Land Code (Cap 81). The significance of the date ie 1 January 1958, is because the term, 'Native Customary Land', is defined in s 2(a) of the Sarawak Land Code (Cap 81) as, 'land in which native customary rights; whether communal or otherwise have lawfully been created prior to 1 January 1958, and still subsists as such'. In other words, the Sarawak Land Code recognises such land as native customary land if it can be shown that native customary rights have been lawfully created over the said land prior to 1 January 1958 and continue to subsist as such. It is from the said land that the respondents claim that they derive food, valuable medicine, wildlife and other forest produce for their livehood and sustenance. They had also cultivated padi, fruits trees, rubber, cocoa and crops thereon. They claim that the said land is not just a source of livehood but also constitute life itself as the said land is fundamental to their social, cultural and spiritual as the natives of Sarawak.

[9] The common defence of the appellants in these appeals is that the disputed land issued to LTH and SMSB is not part of the respondents' native customary lands. They denied that is the respondents have acquired native customary rights over the disputed land.

[10] Now, let us look at the pleadings. The respondents are claiming, inter alia, the following reliefs:

(a) a declaration that the respondents have native title and/or native customary rights/or usufructuary rights in the areas in the map marked 'M' and edged in yellow;

(b) a declaration that the issue of the provisional lease of the parcel of land described as Lot 2 Block 4 Selezu Land District and located at Sungai Selejuk, Division of Bintulu, Sarawak in so far as it impairs their native customary rights is bad and/or void;

(c) a declaration that the issuance of the said lease constitutes a violation of arts 5, 8 and 13 of the Federal Constitution;

(d) a declaration that LSB, LTH and SMSB or their servants or agents are trespassing their native customary land and/or otherwise unlawfully interfering with their customary rights in the areas in the map marked 'M'; and

(e) an order for vacant possession of the disputed land.

[11] The lands which the respondents are claiming are identified and described in para 5(b) of the statement of claim as follows:

> 5(b) The boundary or extend of the said lands are more particular (sic) set out in a map annexed hereto and marked 'M' and edged in yellow are the areas within which the plaintiffs claim the said rights and/or title (hereinafter referred to as 'the said native customary land').

[12] By para 5(c) of their statement of claim, the respondents assert that their native customary rights over the native customary lands are recognised by the Sarawak Land Code (Cap 81) and or its predecessors and that the native customary rights were created and/or acquired prior to 1 January 1958 and still subsist as such.

[13] The SLS and SGS joint defence to paras 5(b) and (c) of the statement of claim is stated in paras 5.2, 5.3 and 5.5 of their statement of defence:

> 5.2 Further, the 4th and 5th Defendants deny that the area edged in yellow, as set out in the map marked 'M' referred to in paragraph 5(b) of the Statement of Claim and annexed thereto the Statement of claim (hereinafter called the map marked

'M') are lands over which native customary rights and/or native title and/or usufructuary rights have been acquired and put the Plaintiffs to strict proof thereof.

5.3 Further, the 4th and 5th Defendants say that if the Plaintiffs did occupy the area edged in yellow in the map marked 'M', which is denied, such alleged occupation did not commence prior to 1st January, 1958; and there was no permit issued under section 10 of the Land Code (Cap. 81) of Sarawak to the Plaintiffs for the occupation thereof.

5.4 Additionally, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' has not been unequivocally identified and the same is bad for uncertainty.

[14] LSB, LTH and SMSB joint defence to the respondents' claim over the disputed land include, among others, the following:

(a) LSB deny trespassing on the respondents' native customary lands;

(b) LTH and SMSB claim that they are the registered holders of the provisional lease of state land and that they have paid valuable consideration in the form of premium to the State Government of Sarawak;

(c) LTH and SMSB claim that they are the registered holders of the provisional lease of state land and that they have paid valuable consideration in the form of premium to the State Government of Sarawak; and

(d) LSB, LTH and SMSB deny entering, clearing, using or occupying the respondents' native customary lands.

[15] After a full trial involving 20 witnesses for the respondents and two witnesses for the appellants the learned trial judge allowed the respondents' claims for declarations in the following terms:

(i) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim, and

(ii) A declaration that the two provisional leases issued by the 4th and 5th defendants are subjected to the native title and/or native customary rights and or usufructuary rights of the plaintiffs in or over the native customary lands.

[16] Pursuant to the said declarations the learned trial judge made the following consequential orders:

(i) that the two provisional leases are to be rectified by the 4th defendant to exclude the plaintiff said native customary lands;

(ii) that the plaintiffs be given forthwith vacant possession of their native customary land;

(iii) that damages be assessed by the Senior Assistant Register; and

(iv) that interest and cost be paid to the plaintiffs.

[17] The learned trial judge's finding that the respondents have native title and/or native customary rights or usufructuary rights within the provisional lease was however not based on map 'M'. It was based entirely and exclusively on four different maps, tendered as exhs P7, P8, P10 and P11 which were prepared by PW5. This is what His Lordship in his judgment said:

> In proving the location of the NCR claims, PW5 was called to testify as to how he mapped the NCR area claimed by the plaintiffs. The maps produced by PW5 are exhs P7, P8, P10 and P11. PW5's qualification is set out in exh PW5 A — and though not a licensed surveyor, I find him to be a competent witness in view of his experience in the field of mapping. In producing the maps PW5 had relied on the data collected by PW28 and Hydaeki Gani Ak Ujai who were trained by PW5 as to how to collect the relevant data. In collecting the data, they, of course, relied on the boundary as told to them by the various communities of Sg Sepandok, Sg Selezu and Sg Setulai. Since I have found the evidence of the plaintiffs to be credible, I have no reason to doubt the veracity of data collected by PW18 and Hydaeki Gani Ak Ujai. Accordingly, I accept the accuracy of the maps tendered in court delineating the boundary of NCR claims of the communities of Sg Sepandok, Sg Selezu and Sg Setulai.

THE GROUNDS OF APPEAL

[18] A common ground of appeal by the appellants in both appeals is that there is no evidence whatsoever, either from the respondents' witnesses or from the documentary evidence that the provisional lease issued to LTH and SMSB, was native customary lands as indentified in the map marked 'M' in the statement of claim. None of the respondents' witnesses including PW5 made any reference to map 'M'. Map 'M' itself was never tendered in evidence, although referred to in the statement of claim. PW5, who prepared the maps in exhs P7, 8, 10 and 11 did not anywhere in his evidence testify that these maps were similar to map 'M' or that these maps cover or include a substantial part of the land in the provisional lease issued to LTH and SMSB. In fact none of the respondents' witnesses gave any evidence on map 'M'.

[19] Another common ground of appeal is that the judgment of the learned trial judge was not based on the respondents' own pleadings.

[20] The main focus in the appeals before us was on map 'M'. There was some confusion as to the existence of map 'M' as we could not find it in the

records of appeal. We asked learned counsel for both sides on the existence of map 'M'. Datuk JC Fong who appeared for SLS and SGS and Mr Sim who appeared for LSB, LTH and SMSB informed us that the statement of claim served on them was without map 'M' although the statement of claim states that map 'M' is annexed to it. Mr Baru Bian, learned counsel for the respondents insisted that map 'M' was served on the appellants together with the statement of claim. He even told us that he has the map with him. When requested, he could not produce it.

[21] After some hesitation, Mr Baru Bian, learned counsel for the respondents conceded that map 'M' was not included in the bundle of documents produced at the trial; it was never tendered at the trial and it is not in the appeal records before us. Learned counsel for the respondents then somewhat changed his position and submitted that the respondents relied on the maps in exhs P7, 8, 10 and 11 to prove their case. As I understand it, he is not relying on 'M' to prove his client's case.

[22] I have read the records of appeal over and over to satisfy myself whether map 'M' was in fact tendered as evidence and whether any of the witnesses from either side, whether through their oral testimony or from the witnesses' statements, have made any reference to map 'M'. I find that map 'M' was never tendered as evidence in support of the respondents' claim, although that was their pleaded case. I also find that none of the respondents' witnesses either by way of oral testimony or from their witnesses' statements made any reference to map 'M'. In fact, there was never any attempt by learned counsel for the respondents to establish the existence of map 'M' from the respondents' witnesses at the trial. PW5, the respondents' principal witness was never examined on map 'M' nor did PW5 testify that any of the maps in exhs P7, 8, 10 and 11 was similar to map 'M'.

[23] Thus, there was no evidence before the trial judge either by documentary evidence or orally that the disputed land in the provisional lease was in fact the respondents' native customary land as set out in map 'M'. There was also no evidence before the trial judge that the land in the maps as in exhs P7, 8, 10 and 11 was the same land as set out in map 'M'. In fact it was never put to the respondents' witnesses that maps P7, 8, 10 and 11 were similar to map 'M'. Thus, it is impossible to make a finding of fact that the land in maps P7, 8, 10 and 11 is the same land as in map 'M' as map 'M' was never tendered in evidence. There was never any attempt to amend the statement of claim to substitute map 'M' with maps P7, 8, 10 and 11 so as to suit the respondents' evidence.

[24] There is however evidence in general from the respondents' witnesses relating to native customary rights and native customary lands. But there is no

concrete evidence that their native customary lands are within the area in the map marked 'M' and edged in yellow. The absence of such evidence was due to the fact that map W was never tendered at the trial. There is also no evidence that the land within the boundary of map 'M' is the same land or substantially part of the disputed land that had been issued to LTH and SMSB. In fact PW13, PW14, PW15 and PW16 admitted that their customary lands did not encroach on LTH and SMSB land; a fact which the learned trial judge acknowledged in his grounds of judgment.

[25] There is evidence that certain parts of the disputed land in the provisional lease overlap with that claimed by the respondents based on maps P7, 8, 10 or 11. But the problem is this. There is no evidence that the overlapping areas form part of the land in map 'M' due to the absence of the said map. Thus, it is obvious that the findings of facts and the declarations granted by the High Court on the basis of map 'M' were erroneous and unsupported by evidence.

[26] It is a settled principle of law that in an appeal on findings of facts, the appellate court should not interfere with those findings unless it appears that they are clearly wrong: *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. Where, as here, the findings of facts and the declarations granted by the trial judge are found to be erroneous and unsupported by evidence the appellate court is justified in coming to a different conclusion.

[27] At the hearing of the appeals before us, learned counsel for both sides made lengthy submission on the law pertaining is to native customary rights and native customary lands with reference to several local as well as foreign cases.

[28] In my judgment, first and foremost, the respondents have to establish as a matter of fact that the area in the disputed land which they are claiming, is the same land or substantially part of the same land which is set out in map 'M'. The submission on the law with regard to native customary rights and native customary lands would only be relevant if, and only if, the respondents have first established that the area in the disputed land is the same land or substantially part of the same land as set out in map 'M'.

[29] The next common ground of appeal is on the pleading. It is the respondents' pleaded case that the land in the provisional lease cover their native customary land or include a substantial part of their native customary lands as in map 'M'. It is trite law that parties are bound by their own pleading (*Kanagasabai Satkuru v United Malayan Banking Corporation Bhd* [1981] 2 MLJ 23, *State Government of Perak v Muniandy* [1986] 1 MLJ 490). Pleading

is not evidence. Order 18 r 7 of the Rules of the High Court 1980 states that facts, and only facts that must be pleaded but not the evidence by which these facts are to be proved (*Dowman's case* (1586) Co Rep 7b, Moo KB 191; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422). Thus, what is alleged and not admitted needs to be proved.

[30] The importance of pleading cannot be taken lightly. In *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; [1989] 1 CLJ Rep 116 the Supreme Court (as it then was), said:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is …

[31] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330 Gun Chit Tuan SCJ, in delivering the judgment of the then Supreme Court endorsed what Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 said on the function of pleadings:

> In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[32] So, if the respondents intend to rely on the maps in exhs P7, 8, 10 or 11 to prove their case against the appellants, they must state that facts in their pleading, otherwise they are not entitled to give evidence of them at the trial. (*West Rand Central Gold Mining Co v R* [1905] 2 KB 391 at p 399). Where the respondents' pleaded case is based on map 'M', as in our case, they must give evidence that the land in the provisional lease is their land or substantially part of their land as set out in map 'M' and thereafter prove that the said land in map 'M' is their native customary lands, failing which the action is liable to be dismissed.

[33] Thus where for instance, the evidence at the trial established facts different from those pleaded by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed (*Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764;

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 227 and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890. Where the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed to stand (*Pawding v London Brick Co* [1971] 4 KIR 207; *Yew Wan Leong v Lai Kok Chye*).

[34] In the appeals before us the learned trial judge granted the declarations based on map 'M' which was never tendered as evidence. He even went beyond what was claimed by the respondents. He granted a declaration in respect of *two* provisional leases and *not one* provisional lease as specified in the statement of claim.

[35] It is clear from the judgment of the learned trial judge that he granted the said declarations based on the evidence of PW5 and the maps in exhs P7, 8, 10 and 11, which were prepared by PW5 but were never pleaded in the statement of claim. Such judgment is contrary to pleading, untenable in law and liable to be set aside.

[36] There are several other grounds of appeals raised by the appellants but I do not find it necessary to deal with them in view of what I have said above.

RETRIAL

[37] My view on retrial is this. I do not see any justifiable basis for a retrial. This court has the power to order a retrial under s 71 read with s 72 of the Courts of Judicature Act 1964 but the conditions stated therein are not present in the appeals before us.

[38] The position of the respective parties at the hearing of the appeal before us was very clear. Retrial was never in the minds of any party. The appellants' contention was that the order of the High Court was unsupported by evidence. Map 'M', which was the basis of the respondents' pleaded case was not put in evidence before the learned trial judge. The respondents on the other hand, while conceding that map 'M' was not tendered as evidence, consistently held the view that the maps in exhs P7, 8, 10 and 11 showed that the area in the disputed land cover their native customary lands or include a substantial part of their native customary lands.

[39] At the hearing of these appeals, it has never been suggested at any time that the trial was a nullity; that there was a miscarriage of justice; that there was a breach of the rules of natural justice or that the trial court has no jurisdiction. Both sides were represented by experience and able counsel at the trial. The respondents did not see it fit to amend their pleading to suit the evidence adduced before the court knowing that map 'M' was never tendered as evidence. Map 'M' as pleaded ought to be within their knowledge and

possession. In my judgment, this case had been decided on its merits after a full trial and after hearing witnesses from both sides.

[40] The learned trial judge in his brief supplementary ground of judgment which was made pursuant to the consent order of this court did not see it fit to clarify on the status of map 'M' upon which he relied in granting the declarations.

[41] For the aforesaid reasons, I allow the appeals by the appellants with costs and set aside the order of the High Court dated 21 January 2010.

[42] After conferring with my learned brother, Azhar Ma'ah JCA, we agree that the appellants in each appeal be given costs of RM50,000 here and below. The deposit in CA No Q-02–394 of 2010 shall be refunded to the appellants therein.

Mohd Hishamudin JCA (dissenting):

[43] These consolidated appeals are from the decision of the learned judge of the High Court of Kuching given on 21 January 2010. The learned judge had granted, among others, the following reliefs prayed for by the respondents (the plaintiffs before the High Court):

(a) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim (native customary rights).

(b) A declaration that the two provisional leases issued by the fourth and fifth defendants are subjected to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the native customary lands.

[44] The other reliefs granted are consequential in nature.

[45] I am allowing these appeals; but with no order as to costs. I am also ordering that this matter be sent back to the High Court of Kuching for a retrial before another judge.

[46] I shall now explain my grounds.

[47] The respondents/plaintiffs are Ibans. They are residents of longhouses in Selezu, Setulai and Sepadok, all in the District of Sebauh, Bintulu Sarawak. They are aggrieved by the fact that the State Government of Sarawak (the

second appellant in Civil Appeal No Q-01–104 of 2010/ the fifth defendant) had issued (through the Superintendent of Lands and Surveys Department, Bintulu Division, the first appellant in Civil Appeal No Q-01–104 of 2010/ the fourth defendant) two provisional leases to two companies, namely, the second and third appellants in Civil Appeal No Q-02–394 of 2010/ the second and third defendants (the first appellant in Civil Appeal No Q-02–394 of 2010/ the first defendant is a joint venture company of the second and third defendants). The plaintiffs claim that the areas covered by the leases encroach into lands over which they have native customary rights. They commenced this action against the five defendants, seeking certain declarations asserting their legal rights over the lands and other consequential remedies.

[48] In my judgment, in the light of the following factors, namely, the absence of an alleged vital document in the appeal records, namely, a map marked 'M', the opposing and contradictory positions taken by the respective parties on the issue as to whether or not such a map ever existed in the first place, and (with respect) the unclear and non-committal position taken by the learned trial judge in his main grounds of judgment and in his supplementary grounds of judgment pertaining to this alleged map 'M', have cast a cloud over the propriety and legality of the entire proceedings before the High Court. In the course of the hearing of these appeals, I had posed several times to counsel of both sides the question as to whether the map in question was ever attached to the statement of claim, as alleged in the statement of claim, but I do not seem to get clear and satisfactory answers. From the unsatisfactory and differing answers that I got from counsel, it would appear to me that the entire proceedings before the High Court was a messy affair, if not weird. There could possibly have been a mistrial and a miscarriage of justice contributed by all parties to the proceedings, including, with respect, the learned trial judge.

[49] I shall elaborate on what I meant by my foregoing remarks.

[50] Firstly, if we were to examine the sealed order of the High Court (the subject matter of the appeals), the first two paragraphs of the order read:

> (i) A declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim (native customary rights).
>
> (ii) A declaration that the two provisional leases issued by the 4th and 5th defendants are subjected to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the native customary lands.

[51] It is to be noted that the order makes reference to a particular map that is, a map marked 'M' that is said to be attached to the statement of claim.

Legally, this map should be attached to the order as an appendix. This has to be so for the purpose of the execution of the order. Yet if one were to examine the order one would find that this particular map 'M' is not attached to the order.

[52] All parties, including the learned trial judge (by way of a request for a supplementary grounds of judgment), have been queried as to this absence of this map 'M' from the order, but, with respect, I do not seem to get clear or satisfactory answers.

[53] Secondly, the statement of claim makes reference to this 'map M'. Paragraph 5(b) of the statement of claim states:

> (b) The boundary or extend of the said lands are more particularly set out in a map annexed hereto and marked 'M' and edged in yellow are the areas within which the Plaintiffs claim the said rights and/or title (hereinafter referred to as 'the said native customary land').

[54] Yet there is a dispute of fact as to whether this 'map M' was ever attached to the statement of claim. Encik Baru Bian, learned counsel for the plaintiffs/respondents, insists that the said map was appended to the statement of claim. But, the problem is, this 'map M' could not be found in the appeal records. It does not appear to be annexed to the statement of claim. And, in the course of the hearing of these appeals, when I requested him to supply this court a copy of 'map M', he was not able to do so, giving the lame reason that he had no more copies of 'map M' in his possession.

[55] Learned senior state legal counsel, Datuk Fong, for the fourth and fifth defendants, on the other hand, maintains that the 'map M' was never attached to the statement of claim. Encik Sim, learned counsel for the first, second and third defendants also takes the same position. However, if this was so, then, when the defendants were served with the writ and statement of claim, it must be obvious to them then that they were served with an incomplete statement of claim, a seriously defective statement of claim; a statement of claim that did not make sense. And so, as a matter of legal courtesy, the defendants' solicitors were duty bound to bring to the attention of the plaintiffs' solicitors of this absence of 'map M' from the statement of claim. After all, no one is perfect and solicitors, at times, do tend to make the silliest of mistakes. But then that is only a matter of legal courtesy. Strictly, as a matter of law, the defendants' solicitors could take the hard line position that it is not the business or duty of the defendants' solicitors to point out to the plaintiffs' solicitors their mistake. They could take the position that the plaintiffs' solicitors had made a serious blunder, and so they (the plaintiffs' solicitors) must be prepared to face the adverse legal consequences. In the present case, the defendants' solicitors took the latter course of action: they did not point out to the plaintiffs' solicitors of

the fact that 'map M' was not attached to the statement of claim that was served on the defendants. They proceeded to file their respective statement of defence. But the thing that perplexed me is that if the position taken by the defendants' solicitors is that 'map M' was never at all attached to the statement of claim that was served on the defendants, why were the defendants' respective statement of defence drafted in a manner as if they were served with 'map M' annexed to the statement of claim and had knowledge what the map contained? For example, paras 5.5 and 5.6 of the fourth and fifth defendants' statement of defence state:

> 5.5 Additionally, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' has not been unequivocally identified and the same is bad for uncertainty.
>
> 5.6 Notwithstanding paragraph 5.5 above, the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' were and/or are areas covered by Forest Timber Licences No T/0278 and T/4263 and Licence To Take Forest Produce No OT/4315. By reason thereof, if, which is not admitted, the Plaintiffs have any native customary rights over the area edged in yellow in the map marked 'M' or any part thereof, such rights have been abandoned, waived or extinguished by reason of the Plaintiffs' acquiescence to logging activities over the same. Such logging activities are still continuing.

[56] Now, if the fourth and fifth defendants are claiming that 'map M' was never attached to the statement of claim that was served on them, and assuming that this claim is, indeed, true, then, it must logically follow that they had never seen 'map M' at all. But if they had never seen 'map M' at all, then how is it possible for the fourth and fifth defendants to make the above averments in their statement of defence? In particular, how could the fourth and fifth defendants possibly aver to the effect:

> … the 4th and 5th Defendants say that the area edged in yellow in the map marked 'M' were and/or are areas covered by Forest Timber Licences No T/0278 and T/4263 and Licence To Take Forest Produce No OT/4315.7

[57] How could the fourth and fifth defendants know this as a fact if they had not seen 'map M'?

[58] Thirdly, to repeat what has been said earlier, the defendants' counsel take the position that 'map M' was never attached to the statement of claim. If this was so, then, why was this non-attachment of the map to the statement of claim not brought to the attention of the learned judge during case management? Or, why wasn't an objection taken by the defendants' counsel during case management? After all, this is a serious omission on the part of the plaintiffs' solicitors. The omission makes the pleadings meaningless. How was the case to proceed to trial if the pleadings are materially incomplete? Now,

instead of the defendants' counsel raising the issue during case management about the absence of 'map M' from the statement of claim, on the contrary, we have the strange and unexplained situation, where the parties agreeing to the following issue to be tried:

> 2. Whether the Plaintiffs, at all material times, have acquired native customary rights (NCR) and/or native title and/or usufructuary rights over the lands at and/or around the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak, the boundary or extent whereof is as particularly delineated in yellow in the map annexed to the Statement of Claim marked as 'M' (hereinafter referred to as 'the said native customary land').

[59] Just as in the preceding situation that I have pointed out, the defendants appear to be taking contradictory positions.

[60] Further, the learned judge having conduct of the case management, on his own volition, ought to have inquired from the plaintiffs' counsel about 'map M' if the map was not annexed to the statement of claim — if, indeed, the defendants' claim, that the map was not annexed to the statement of claim, is true. The learned judge on his own volition ought to have made an order directing the plaintiffs' solicitors to rectify the bundle of pleadings if it was a fact that the map was not annexed to the statement of claim; and ought to have dismissed the plaintiffs' suit should the plaintiffs fail to comply with such an order. With respect, it is wrong for the learned judge having conduct of the case management to have ordered the matter to proceed to trial if it is obvious that the pleading is materially defective. But, then, again, the question is, what was precisely the situation before the learned judge during the case management stage — particularly in the light of the agreed main issue pertaining to 'map M'?

[61] Fourthly, if the defendants take the position that 'map M' was never attached to the statement of claim, then the order or ruling of the learned judge made at the conclusion of the trial, making reference to 'map M', was clearly erroneous. It follows then that the draft order as proposed by the plaintiffs' solicitors to the defendants' solicitors for the latter's approval must also be erroneous as well as the proposed draft order contains a reference to 'map M'. Yet, despite taking the position that 'map M' was never at all attached to the statement of claim, the defendants' solicitors never questioned the correctness of either the ruling/order of the learned judge (at the conclusion of the trial) or the plaintiffs' solicitors' proposed draft. Nor did they ever request to the High Court for an appointment with the learned trial judge for a review of the learned judge's ruling or order before the draft order was perfected. Instead, the defendants' solicitors, without any question or reservation whatsoever, proceeded to approve the proposed draft order and allowed it to be perfected.

[62] Fifthly, En Barum Bian, in the course of his submission before this court, when questioned by me about 'map M', insisted that this alleged map was attached to the statement of claim. If this is true, then, how is it that the appeal records do not contain 'map M'? It is true that the appeal records are prepared by the appellants' solicitors and not by the respondents' solicitors. But where such an omission is obvious and clearly prejudicial to the plaintiffs/respondents, the plaintiffs' solicitors owe a duty to their clients to bring to the attention of the appellants' solicitors of such an omission; and, subsequently, to bring to the attention of this court if, after having been so notified, such an omission is still not rectified by the appellants' solicitors.

[63] But be that as it may, En Barum Bian informed this court that in the course of the trial the plaintiffs had decided not to rely on 'map M': instead, the plaintiffs relied on another map. If this was so, then, how does one explain the fact that the learned trial judge, in his main grounds of judgment, began by saying:

> Proceedings
>
> The plaintiffs, Iban by race, claim for native customary rights on lands as residents of the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak. The exact location of their claim is as set out in the map annexed to the statement of claim marked 'M' and edged yellow. The defendants deny the existence of such claims and in substance puts the plaintiffs to strict proof.

[64] Again, if indeed, the plaintiffs had abandoned 'map M' in the course of the trial, then, how is it that the learned judge, at the conclusion of the trial, still made an order referring to 'map M', as I have pointed out at the beginning of this judgment? And, how is it that, when the learned trial judge made such a reference (to 'map M') at the end of the trial, En Baru Bian did not request an appointment with the learned judge to correct the 'error', but instead proceeded to prepare a draft order that makes a reference to 'map M'?

[65] Sixthly, the learned trial judge referred to 'map M' twice in his main grounds of judgment, that is, as I have pointed out, the first time at the first paragraph of his grounds of judgment and the second time at the concluding part of the same. As this 'map M' is not found in the appeal records (and nor could we obtain a copy of this alleged map either from the parties or from the High Court file) and since there is a dispute between the appellants and the respondents as to whether or not this particular map was appended to the statement of claim as alleged in para 5(b) of the statement of claim, we proposed to all counsel before us that the learned trial judge ought to be given an opportunity to clarify as to whether 'map M' was in fact appended to the statement of claim. All counsel before us agreed to the proposal and hence the court's registrar was directed to write to the secretary of the learned trial judge

to request a supplementary grounds of judgment from the learned judge that would shed more light on 'map M', particularly, on the question as to whether the said 'map M' was ever annexed to the statement of claim, since there is a dispute between the parties as to whether the said map was annexed to the statement of claim. The registrar's letter brought to the learned trial judge's attention that the said 'map M' could not be found in the appeal records. The registrar's letter also brought to the attention of the learned trial judge of the fact that although En Baru Bian had informed the appeal court that 'map M' was never tendered as an exhibit to the High Court during the trial, yet there is still this reference to this 'map M' in the learned trial judge's grounds of judgment and in the sealed order of the court. The learned judge furnished his supplementary grounds of judgment as requested by us. However, with respect, in his supplementary grounds of judgment, the learned judge, unfortunately, does not appear to me to have provided clear answers to the matters sought by the registrar's letter. The supplementary grounds of judgment merely say:

> Pursuant to the direction of the Court of Appeal through a letter ref () dalam MRRS No Q-02–289 of 2003 dated 27 July 2010, I now give my 'Alasan Penghakiman lanjutan' as follows:
>
> > In respect of the plan marked 'M', it is the plan attached to the statement of claim as set out in para 5(b) of the statement of claim wherein it states that plan marked 'M' is attached.
> >
> > For ease of reference, the relevant paragraph of the statement of claim is reproduced as per Appendix A.
>
> The defendants also made reference to this map. A copy of the defence of the first, second and third defendants dated 26 September 2001 filed by their advocates is also attached as per Appendix B. A copy of the defence of the fourth & fifth defendants dated 14 September 2001 filed by the legal officer of the state attorney general chambers is hereby attached as Appendix C.

[66] It is to be noted that the above supplementary grounds of judgment does not confirm whether or not 'map M' was attached to the statement of claim; nor does the learned trial judge explain as to why he made reference to 'map M' twice in his main grounds of judgment when the plaintiffs did not refer nor tender the said 'map M' during the trial. Although the learned trial judge was informed by the registrar's letter that 'map M' could not be found in the appeal records, yet the learned judge in his supplementary grounds of judgment did not think it fit to assist the Court of Appeal by appending a copy of the said controversial map. Instead, the learned judge only referred to the statement of claim and to the statement of defence of the respective defendants and appended these documents to his supplementary grounds of judgment; but, with respect, this is of no assistance to us as these are documents that we are familiar with and which could be found in the appeal records anyway.

[67] In conclusion, I hold that in spite of the supplementary grounds of judgment of the learned trial judge, the question as to whether or not 'map M' was ever appended to the statement of claim, remains unanswered. In my judgment, considering the whole scenario in its totality, this is a highly unsatisfactory state of affairs. This issue about the existence of 'map M' should not be allowed to linger. On my part, it is still lingering in my mind. Undoubtedly, these appeals must be allowed. But the difficult question is: should there be a retrial? Having given a serious thought on this issue, I am taking the position that in all probability there had been a mistrial and the appropriate course of action under the circumstances would be to order a retrial before another judge; and that there should be no order as to costs.

[68] Appeals allowed with no order as to costs; order of the High Court set side and a retrial ordered to be held before another judge.

Appeals allowed with costs here and below.

Reported by Ashok Kumar